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**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA (FRESNO DIVISION)**

JANINE CHANDLER; KRYSTAL GONZALEZ;  
TOMIEKIA JOHNSON; NADIA ROMERO,  
individuals; and WOMAN II WOMAN, a  
California non-profit corporation,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION;  
KATHLEEN ALLISON, Secretary of the  
California Department of Corrections and  
Rehabilitation, in her official capacity; MICHAEL  
PALLARES, Warden, in his official capacity;  
MONA D. HOUSTON, Warden, in her official  
capacity; and DOES 1-10, inclusive,

Defendants.

Case No. 1:21-cv-01657-JLT-HBK

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE  
DECLARATIONS ATTACHED TO  
PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS**

**INTRODUCTION**

Plaintiffs submit this memorandum of points and authorities in opposition to Defendants' Motion to Strike Declarations Attached to Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF No. 38, filed June 10, 2022) (herein, "MTS"). The declarations challenged by Defendants'

MTS are the twelve declarations submitted with Plaintiffs' opposition to Defendants' Motion to

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE DECLARATIONS**

Dismiss, ECF Nos. 36-1 to 36-12 (herein collectively, the “Declarations”).

Defendants move to strike on the bases that the Declarations contain irrelevant evidence and improperly attempt to supplement Plaintiffs’ complaint. *See* MTS (ECF No. 38) at 2. However, Defendants neglect to acknowledge that Defendants initiated a “factual attack” on Plaintiff’s complaint and introduced extrinsic evidence submitted with their Motion to Dismiss. *See, e.g.*, ECF No. 15-1 at 11; ECF No. 15-2 at Exhibits A-S (Defendants’ Request for Judicial Notice); ECF No. 15-4 (Declaration of J. Thissen in Support of Defendants’ Motion to Dismiss). The evidence presented in the Declarations submitted by Plaintiffs is relevant to buttressing the allegations in Plaintiffs’ complaint stating claims upon which relief may be granted, and supporting a conclusion that Plaintiffs are suffering actual and threatened concrete injury sufficient to confer Article III standing. For reasons discussed *infra*, Plaintiffs respectfully request that the Court deny Defendants’ MTS and consider the Declarations as part of the record in this case.

### **ARGUMENT**

#### **A. The Court Should Exercise Its Discretion To Consider Both Parties’ Extrinsic Evidence**

A motion to dismiss under Fed. R. Civ. Proc. 12(b)(6) (failure to state a claim) challenges the sufficiency of the complaint’s allegations, granted only where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). Extrinsic evidence, beyond the four corners of the complaint (or evidence attached to or incorporated by reference into the complaint) may be considered only if properly subject to judicial notice.

Matters properly subject to judicial notice include matters of public record, but a court “cannot take judicial notice of disputed facts contained in such public records.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (internal quotation marks and citations omitted). Defendants submitted disputed facts that happen to be contained in publicly available

1 records, such as the legislative history of SB 132 (the law challenged in Plaintiffs' complaint) and  
2 various social media posts and website pages ostensibly controlled by Plaintiffs, and by Defendants,  
3 as well as records relating to Defendant CDCR's processing of administrative grievances generally,  
4 and grievances specifically made to CDCR by Plaintiffs. While "records and reports of  
5 administrative bodies" may be appropriate for judicial notice, "the existence and content of a police  
6 report are not properly the subject of judicial notice." *United States v. Ritchie*, 342 F.3d 903 (9th  
7 Cir. 2003) (internal quotation marks and citations omitted). Internal grievance records of a prison  
8 agency are analogous to the "content of a police report." *Id.*

9  
10 Further, "facts" obtained from websites controlled by one or both parties are not necessarily  
11 appropriate for judicial notice, particularly where the statements are in dispute. The "Court may not  
12 take judicial notice of facts favorable to the moving party that could be reasonably disputed." *U.S.*  
13 *v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). As demonstrated in Plaintiffs'  
14 Memorandum in Opposition to Defendants' Motion to Dismiss (ECF No. 36), Plaintiffs can and do  
15 "reasonably dispute" the statements contained within the extrinsic evidence submitted by  
16 Defendants with the Motion to Dismiss.

17  
18 As Defendants note in the MTS, when a party submits extrinsic evidence not authorized for  
19 consideration in a Rule 12(b)(6) motion to dismiss, the Court may refuse to consider the extrinsic  
20 evidence, or convert the motion to dismiss to a motion for summary judgment. *See* Fed. R. Civ.  
21 Proc. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are  
22 presented to and not excluded by the court, the motion must be treated as one for summary judgment  
23 under Rule 56. All parties must be given a reasonable opportunity to present all the material that is  
24 pertinent to the motion.") *See also Silk v. Metro Life Ins. Co.*, 477 F. Supp. 2d 1088, 1091 (C.D.  
25 Cal. 2007), *aff'd*, 310 F. App'x 138 (9th Cir. 2009) ("Where a defendant attaches extrinsic evidence  
26 to a motion for judgment on the pleadings, the court generally must convert that motion into one  
27

1 for summary judgment.”) In a case where both parties presented declarations and “other extrinsic  
2 evidence outside the pleadings” the court need not exclude that evidence, and may rely on it, as  
3 “represented parties had notice that the court may use the evidence they submitted to the court[.]”  
4 *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985) (internal quotations and  
5 brackets omitted).

6 In the instant case, Defendants moved for dismissal ostensibly under Rule 12(b)(6), yet  
7 submitted and relied upon a substantial amount of extrinsic evidence (314 pages) to factually  
8 “attack” Plaintiffs’ standing to pursue claims and to argue that Plaintiffs fail to state claims upon  
9 which relief may be granted. In response, Plaintiffs submitted extrinsic evidence of their own (161  
10 pages), in support of their actual and imminent injury conferring standing and of the legal  
11 sufficiency of the harms constituting violations of the First, Eighth, and Fourteenth Amendments  
12 of the U.S. Constitution.

14 All parties are represented by counsel, and understood that evidence submitted could and  
15 should be considered by the Court. In fact, Defendants introduced additional extrinsic evidence in  
16 their reply to Plaintiffs’ opposition to Defendants’ motion to dismiss. *See, e.g.*, Def.’s Reply to  
17 Oppo. To Motion to Dismiss (ECF No. 39) at 14 (citing to Defendants’ Request for Judicial Notice,  
18 ECF No. 15-2 at Exhibit S and providing hyperlink to: <https://www.cdcr.ca.gov/prea/sb-132/faqs/>).  
19 Troublingly, however, Exhibit S of Defendants’ Request for Judicial Notice is a print-out of  
20 Defendant CDCR’s own “Senate Bill 132 FAQs” webpage (found at the hyperlink above and  
21 referred to herein as “FAQ Webpage”), as it appeared on the date Defendants filed their Motion to  
22 Dismiss (4/11/22). However, this FAQ Webpage is a set of statements entirely under the control of  
23 Defendants. Without disclosing changes to the Court, Defendants substantively altered their FAQ  
24 Webpage between their first and most recent references to it. Defendants’ own conduct with respect  
25 to the extrinsic evidence they desire the Court to accept as undisputed facts thus demonstrates the  
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1 contestable (and contested) nature of Defendants' evidence. Changes to the version originally  
2 captured by Defendants as "Exhibit S" to their "Request for Judicial Notice," versus how that  
3 webpage currently, include:

- 4       • The very first FAQ, version "Exhibit S" read in relevant part: "As of February 25,  
5       2022, there are 1,430 incarcerated people identified as transgender, non-binary and  
6       intersex." The current version (accessed 6/15/22) reads: "As of May 23, 2022, there  
7       are 1,549 incarcerated people identified as transgender, non-binary and intersex."
- 8       • The third FAQ, version "Exhibit S" read in relevant part "If disapproved,  
9       notification is given to the incarcerated person who has up to 30 days to grieve the  
10      decision." The current version (accessed 6/15/22) reads: "If disapproved,  
11      notification is given to the incarcerated person who has up to 60 days to file a  
12      grievance of the decision."
- 13      • The sixth FAQ, version "Exhibit S" read: "As of February 25, 2022, 296 people  
14      housed in male institutions have requested to be housed in a female institution. 43  
15      were approved for transfer[.] Nine were denied[.] 18 changed their minds[.] The  
16      remaining requests are being reviewed." The current version (accessed 6/15/22)  
17      reads: "As of May 23, 2022, 342 people housed in male institutions have requested  
18      to be housed in a female institution. 39 were approved for transfer and seven  
19      previously approved people are being reevaluated[.] 14 were denied[.] 28 changed  
20      their minds[.] The remaining requests are being reviewed."
- 21      • The seventh FAQ, version "Exhibit S" read: "As of February 25, 2022, 11  
22      individuals housed in a female institution have requested to be housed in a male  
23      institution. The requests are under review." The current version (accessed 6/15/22)  
24      reads: "As of May 24, 2022, 10 individuals housed in a female institution have  
25      26      27      28

requested to be housed in a male institution. The requests are under review.”

Defendants’ Motion to Dismiss insists that Plaintiffs’ allegations of harms caused by SB 132 are speculative and based on hypothetical chains of events. Plaintiffs’ complaint, as well as the Declarations, allege numerous specific incidents of sexual victimization by male inmates transferred under SB 132 against female inmates as well as the reasonable fear of most women in CCWF that further, similar sexual violations will continue to occur and could happen to any of the imprisoned women. Yet Defendants’ own FAQ Webpage claims that Defendants *do not even track sexual assaults by “gender identity” of the inmate.*<sup>1</sup> Further, the substantive alteration to Defendants’ sixth FAQ illustrates Defendants’ lack of factual basis to deny Plaintiffs’ allegations or evidence of sexual assaults occurring against female inmates perpetrated by male inmates transferred under SB 132. As noted, the first version Defendants cited to contained no reference to a category of SB 132 transferees “being reevaluated” by CDCR. The current version refers to seven SB 132 transferees who are now being “reevaluated” by CDCR. This “reevaluation” category is distinct from CDCR’s category of SB 132 inmates who have “changed their minds.” But nowhere does SB 132 authorize CDCR to “reevaluate” sending a “transgender or nonbinary” male inmate back to a men’s facility once CDCR has approved the inmate to reside in a women’s facility. CDCR has not disclosed (on its FAQ Webpage, or in Defendants’ filings in this case to date) what criteria it uses to decide to “reevaluate” an SB 132-transferred male inmate. But it strains credulity for

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<sup>1</sup> The ninth entry on Defendants’ FAQ Webpage currently reads in relevant part: “Have there been assaults by transgender women on cisgender women? CDCR’s reporting mechanisms do not track assaults by gender identity.” Plaintiffs dispute Defendants’ claim not to have this information, but if accurate this is arguably a serious administrative misstep. If inmates who identify as transgender are legitimately at increased risk of victimization, it would be irresponsible not to track data that allows assessments of sexual victimization and perpetration for this population. Defendants’ couching of this FAQ as involving “transgender women” assaulting “cisgender women” ignores the fact that male offenders are eligible for coed housing under SB 132 even if they do not identify as “female.” Defendants’ FAQ also implies that it is not even possible (or not worth inquiring into the possibility) that a transgender-identified male inmate might assault a female inmate who is also transgender-identified.

1 CDCR to deny that allegations of sexual assault, sexual harassment, or sexual activity with women  
2 might have prompted such “reevaluations.” Defendants’ own extrinsic evidence therefore places in  
3 dispute a material fact in Plaintiffs’ claims: whether SB 132 is the proximate cause of male-on-  
4 female inmate-inmate sexual assaults.

5 In situations where a motion to dismiss is accompanied by extrinsic evidence, the Court  
6 bypasses analysis under a motion to dismiss and treats the motion as one for summary judgment,  
7 particularly where the Court believes a summary judgment analysis efficiently resolves the issues  
8 raised by the party who moved for dismissal. *See, e.g., Fort Vancouver Plywood Co. v. United*  
9 *States*, 747 F.2d 547, 552 (9th Cir. 1984).

11 The practical question, then, is whether Defendants are entitled to have Plaintiffs’ claims  
12 dismissed as a matter of law. The myriad of contested facts presented by both Plaintiffs and  
13 Defendants in the Motion to Dismiss filings demonstrate that reasonable minds could differ as to  
14 the conclusions to be drawn from the facts presented by Plaintiffs and by Defendants, such that  
15 genuine issues of material fact exist in this case. The Court should thus deny Defendants’ MTS  
16 filed against the Declarations and consider the evidence and argument in the record from both sides.

18 **B. Plaintiffs’ Declaration Evidence Is Relevant**

19 Defendants argue in the MTS that Plaintiffs’ declarations should be stricken as “redundant  
20 or immaterial.” *See* MTS (ECF No. 38) at 4. On the contrary, the facts presented in the Declarations  
21 could not be more material and relevant to supporting Plaintiffs’ standing and articulation of  
22 colorable claims against Defendants.

24 Defendants’ Motion to Dismiss, including the volume of extrinsic evidence filed therewith,  
25 contends that Plaintiffs are suffering no harm at all and that nothing about SB 132 or Defendants’  
26 mandate to enforce that law could plausibly be causing Plaintiffs’ harm. Defendants also contend  
27 that harm to Plaintiffs and other women would not be redressed if Plaintiffs’ requested relief (return  
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1 to status quo prior to SB 132, where male inmates were housed in women's prisons only on a case-  
2 by-case basis involving objective factors relevant to women's safety, which factors are "off the  
3 table" under SB 132) was granted. Additionally, Proposed Intervenor filed a proposed answer  
4 concurrent with their Motion to Intervene that disputed the basic biological facts of human  
5 reproduction. Plaintiffs responded with extrinsic evidence showing, at the very least, that  
6 Defendants' and Proposed Intervenor's contentions are disputed factually and rationally, including  
7 by declarants who are "transgender" identified. *See, e.g.*, Declaration of Michelle Norsworthy (ECF  
8 No. 36-11); Declaration of Sagal Sadiq (ECF No. 36-6).

10 As the legislative history of SB 132 itself admits, the objective characteristic of sex is first  
11 on the list of factors still utilized by CDCR to determine appropriate facility placement for each  
12 inmate in order to "provide for the safety of the incarcerated people and staff." *See* ECF No. 15-3  
13 at 5. This is an express acknowledgment of the importance of physical and sociological differences  
14 between men and women. Plaintiffs should not have needed experts to explain why housing women  
15 with male offenders who have functioning penises inevitably and foreseeably subjects women to  
16 cruel and unusual extrajudicial punishments. SB 132 abandons basic facts of biology and  
17 criminology that impact the safety and rehabilitation of incarcerated men and women. Defendants  
18 and Proposed Intervenor respond to Plaintiffs' recognition of these basic facts by accusing  
19 Plaintiffs of being either Luddites opposed to social progress or bigots hateful toward trans-  
20 identifying individuals. *See, e.g.*, Def. Memo. ISO MTD (ECF No. 15-1) at 20, 27-28 (analogizing  
21 Plaintiffs' objections to being housed with male criminals with functioning penises to prejudiced  
22 objections to interracial housing or opposition to gay marriage); *see also* Prop. Interv. Memo. ISO  
23 Defs.' Mot. to Dismiss (ECF No. 32) at 16 (calling Plaintiffs' allegations "bigoted and baseless").  
24 Plaintiffs thus present the Court with corroboration for foundational material facts that explain why  
25 SB 132 is causing grave harms to incarcerated women.



1 Only female inmates are at risk of experiencing pregnancy in prison. Sexual violence is  
2 overwhelmingly perpetrated by males. Incarcerated women have histories of male-perpetrated  
3 sexual abuse at disproportionately high rates. Such facts are of fundamental significance when  
4 examining the constitutionality of a law that demands that Defendant CDCR impose predictable,  
5 foreseeable, serious sexual, physical, emotional, and psychological harms to women in its custody.  
6 These harms, which are entirely avoidable by keeping male offenders with functioning penises  
7 physically separated from women, include rape and sexual assault, heightened risk and fear of being  
8 physically and sexually victimized by men, becoming pregnant in prison, and/or becoming infected  
9 with sexually transmitted diseases from sexual intercourse with men. Because these harms and the  
10 underlying facts of reality that cause them are being denied by Defendants and Proposed  
11 Intervenor, Plaintiffs' Declarations, *e.g.*, Declaration of Colin Wright (ECF No. 36-4) and  
12 Declaration of Callie Burt (ECF No. 36-5), provide important context for evaluating whether  
13 Plaintiffs have stated claims that survive dismissal as a matter of law.  
14

15  
16 These harms to women are unjustified even if the male criminals who inflict the harms and  
17 pose the risks to women were themselves vulnerable to being victimized in men's prisons.  
18 Defendant CDCR is obligated to protect *all* inmates, to take reasonable, common sense measures  
19 to reduce sexual victimization of *all* inmates, and to protect *all* inmates from known, predictable  
20 risks. The Declarations support Plaintiffs' allegations that SB 132 forces Defendant CDCR to  
21 choose between protecting women, and complying with SB 132, a conundrum that warrants judicial  
22 scrutiny under constitutional guarantees that all inmates must be free from cruel and unusual  
23 punishments and that all inmates are guaranteed equal treatment under the laws.  
24

25 In addition to the two expert declarations, Plaintiff submitted nine declarations from current  
26 and former inmates, each of whom testified based on personal knowledge, direct observation, and  
27 first-person senses and impressions regarding issues and incidents directly pertinent to Plaintiffs'  
28

1 claims of harms caused by SB 132 and standing to pursue such claims. The remaining declaration  
2 relied on by Plaintiffs, submitted by Plaintiffs' counsel Lauren Adams, merely presents the Court  
3 with the same type of public records evidence submitted by Defendants' own employee (*e.g.*,  
4 Declaration of J. Thissen and Exhibits A-S, ECF No. 15-4) – information gleaned from Defendant  
5 CDCR's own publicly available online inmate locator system, and a transcript of a public hearing  
6 held last August in the California State Senate.

7  
8 **CONCLUSION**

9 Defendants submitted controvertible and controverted extrinsic evidence with their moving  
10 papers and again in their reply in support of their Motion to Dismiss. Defendants acknowledge in  
11 their Motion to Strike that the Court has discretion to consider both parties' extrinsic evidence under  
12 the standards of a Rule 56 motion. It is not uncommon when an early summary judgment motion  
13 has been decided, for the Court to grant leave to amend for a party to bring a second motion for  
14 summary judgment. Thus, the ability of Defendants (and Proposed Intervenor if granted party  
15 status) to request dismissal as a matter of law at a later stage of litigation is preserved while allowing  
16 the Court at this stage to test whether Plaintiffs' claims survive Defendants' dismissal request based  
17 on the relatively voluminous evidence submitted by both Defendants and Plaintiffs. Plaintiffs  
18 therefore respectfully request that the Court deny Defendants' Motion to Strike and consider both  
19 sides' evidence and arguments in the record in ruling on Defendants' Motion to Dismiss.

20  
21 Dated: June 16, 2022

RESPECTFULLY SUBMITTED,

22  
23 By: /s/ Candice Jackson  
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24  
25 By: /s/ Lauren Adams  
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27 *Counsel for Plaintiffs*